

**IN THE CIRCUIT COURT OF COLE COUNTY  
STATE OF MISSOURI**

**CENTRAL UNITED LIFE INSURANCE )  
COMPANY, )**

**Petitioner, )**

**v. )**

**Case No. 09AC-CC00537**

**JOHN M. HUFF, DIRECTOR OF THE )  
DEPARTMENT OF INSURANCE, )  
FINANCIAL INSTITUTIONS AND )  
PROFESSIONAL REGISTRATION, )  
STATE OF MISSOURI, )**

**Respondent. )**

**PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW  
ORDER AND JUDGMENT**

Respondent John M. Huff, Director of the Missouri Department of Insurance, Financial Institutions and Professional Registration files the attached as his proposed Findings of Fact, Conclusions of Law, Order and Judgment.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and accurate copy of the foregoing was mailed, postage prepaid, this 15<sup>th</sup> day of April, 2010, to:

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**FINDINGS OF FACT, CONCLUSIONS OF LAW,  
ORDER, AND JUDGMENT**

This matter comes before the Court to review the administrative record before Respondent, the Director of the Department of Insurance, Financial Institutions and Professional Registration ("Director"), at the behest of Petitioner, Central United Life Insurance Company ("Central United"). In consideration of the entire record and of the written and oral arguments by counsel and for good cause shown, being fully advised of the premises, the Court finds, concludes, orders, and adjudges as follows:

1. Jurisdiction. The Court finds that it has jurisdiction in this matter pursuant to §§ 374.055, 536.100 to 536.140, RSMo, and 20 CSR 100-8.018(3).

2. Scope and Standard of Review. Pursuant to Article V, §18 of the Missouri Constitution, the Court's review of the final decision of an administrative agency "shall include the determination whether the same [is] authorized by law, and in cases in which a hearing is required by law, whether the same [is] supported by competent and substantial evidence upon the whole record." Additionally, the scope of this Court's review is limited to and by § 536.140 RSMo (Supp. 2009). Hence, the reviewing Court is to determine whether the agency action:

- (1) Is in violation of constitutional provisions;
- (2) Is in excess of the statutory authority or jurisdiction of the agency;
- (3) Is unsupported by competent and substantial evidence upon the whole record;
- (4) Is, for any other reason, unauthorized by law;
- (5) Is made upon unlawful procedure or without a fair trial;
- (6) Is arbitrary, capricious or unreasonable; or
- (7) Involves an abuse of discretion.

§ 536.140.2.

“A decision is not arbitrary or unreasonable merely because the court on appeal might have reached a contrary conclusion upon the same evidence.” *Chrismer v. Missouri Div. of Family Servs.*, 816 S.W.2d 696, 700 (Mo. App. W.D. 1991). “Where the evidence before the agency would warrant either of two opposing conclusions, [the court is] bound by the agency’s findings.” *Morton v. Missouri Air Conservation Comm’n*, 944 S.W.2d 231, 236 (Mo. App. S.D. 1997). In reviewing the agency decision, the Court must “defer to the [agency’s] determination regarding ‘weight of the evidence and the credibility of witnesses.’” *Lagud v. Kansas City Bd. of Police Comm’rs*, 272 S.W.3d 285, 290 (Mo. App. W.D. 2008) (citation omitted). The reviewing Court defers to the agency’s findings of fact, if supported by the evidence. *Id.*; *Teague v. Mo. Gaming Comm’n*, 127 S.W.3d 679 (Mo. App. W.D. 2003). Finally, the Court must examine the record in the light most favorable to the Director’s Order. *State ex rel. Family Support Division v. Foster*, 174 S.W.3d 589, 590 (Mo. App. S.D. 2005).

The Court “gives no deference to the agency’s conclusions of law, which are reviewed *de novo*.” *Colyer v. State Bd. of Registration for the Healing Arts*, 257 S.W.3d 139, 143 (Mo. App. W.D. 2008).

3. Burden of Proof. Central United, as the party aggrieved by Director’s administrative decision, bears the burden of persuasion before this Court to show why the administrative decision is in error. *Versatile Mgmt. Group v. Finke*, 252 S.W.3d 227, 232 (Mo. App. E.D. 2008). Central United has not sustained this burden.

4. Findings of Fact. The Findings of Fact contained in the Director's Findings of Fact, Conclusions of Law and Confidential Final Order Accepting Final Examination Report as Filed, dated August 27, 2009 ("Director's Order"), are authorized by law and supported by competent and substantial evidence on the whole record. The Director's Findings are adopted by the Court as the Court's Finding of Facts.

5. Conclusions of Law. (a). The Court finds and concludes that the Findings of Fact contained in the Director's Order are not deficient for failing to rule on each fact proposed by Central United. The administrative matter below was a post-examination proceeding to determine whether the Final Examination Report should be accepted (with or without modifications), rejected or be subjected to an investigatory hearing. 20 CSR 100-8.018(1)(G)1, 2 and 3. Central United was apprised that the administrative hearing below was being conducted pursuant to this rule, and this specific rule governs the Director's Findings of Fact entered in this matter. 20 CSR 100-8.018(3). The Director's Order affirmatively and unequivocally resolved the relevant factual disputes between the parties below and did so in a manner that facilitated this Court's review of the same. The Findings of Fact contained in the Director's Order are sufficient, comply with the law, and are not subject to reversal pursuant to § 536.140.2.

(b). The Court finds and concludes that the Director's Order does not declare the meaning of "actual charges." Rather, the Director's Order concludes that the phrase "actual charges" is ambiguous, a conclusion this Court affirms.

(c). The Court finds and concludes that the Director's Order did not fail to give full faith and credit to *Cora V. Skelton, et al. v. Central United Life Insurance Company*, No CV-2008-900178 (Circuit Court of Mobile County, Alabama). The Director was not a party to this proceeding, and his regulatory authority to address the misbehavior of insurance companies licensed in this state is not dependent on the existence of a policyholder in this state with an unsettled claim concerning that insurance company's misbehavior. Furthermore, Central

United's witness admitted that there were Missouri policyholders who opted out of the *Skelton* settlement, and this fact is additionally demonstrated by Exhibit MM, p. 4. Neither the Director's Order accepting for filing the Final Examination Report nor any demonstrated action taken by the Director evidences a failure to give full faith and credit to the *Skelton* decision.

(d). The Court finds and concludes that the Director's Order was not required to give effect to §376.789, RSMo (Supp. 2009), a statute that had an effective date after the commencement of the underlying administrative proceeding and after the issuance of the Director's Order before the Court. If the legislature had desired this statute to have an effective date prior to August 28, 2009, the statute could conceivably have contained an emergency clause. Art. III, §29, Mo. Const. That four *Skelton* class members opted out of the settlement therein (Exhibit MM, p. 4) suggests there is a group – albeit a small one – of Central United policyholders whose substantive rights would be adversely impacted by a retrospective application of §376.789, RSMo Supp. 2009.

(e). The Court finds and concludes that the Director's Order did not improperly conclude, based upon the entire record, that Central United's policy was ambiguous in utilizing the phrase "actual charge." An ambiguity exists when there is uncertainty in the meaning of a term or terms in an insurance policy. *Christensen v. Farmers Ins. Co., Inc.*, 2010 WL 363445 at \*2 (Mo. App. E.D., February 2, 2010), citing *Jones v. Mid-Century Ins. Co.*, 287 S.W.3d 687, 690 (Mo. banc 2009). If language is "reasonably open to different constructions," then it is considered ambiguous. *Jones*, 287 S.W.3d at 690. "[T]he term 'actual charges' is ambiguous;" in that it "can be reasonably construed to mean the amount set forth on the statement sent by the medical provider to the patient ... the amount the patient was originally billed for the medical services, even if the medical provider is required to accept less from the patient's insurance carrier." *Pedicini v. Life Ins. Co. of Ala.*, 2010 WL 583683 at \*4 (W.D.Ky., Feb. 16, 2010). *Pierce v. Central United Life Ins. Co.*, 2009 WL 2132690 at \*9 (D. Ariz., July 15, 2009) (interim

order concluding that because the phrase can have multiple meanings, it is ambiguous, and Central United's policy should be construed in favor of the insured).

Section 376.777.7(3), RSMo, prohibits ambiguities in individual health insurance policies. For the policy forms to comply with §§376.777.7(3) and 376.780.2, RSMo, Central United was under an obligation to interpret the undefined term "actual charges" in the manner most favorable to the insured. By adopting and implementing the less favorable interpretation and claims administration procedures for those policies where "actual charges" was undefined, Central United violated §376.780 by delivering policies not in conformity with §376.777.7(3).

(f). The Court finds and concludes that the Director, based on the whole record, properly concluded that Central United violated the insurance laws of the State of Missouri. These violations took a variety of forms.

(i). Central United's use of Endorsement Form CP3ACEND, was an ineffective attempt to change the terms of its policy, #CP3000AMO. Central United's policies were guaranteed renewable and could not be unilaterally modified by Central United without the policyholders' consent and an exchange of consideration. By way of this attempted modification and by its changed administration practices, Central United committed an unfair trade practice (§375.934(2)), by violating §§375.936(13) and 375.445, with such frequency to indicate a general business practice to engage in that type of conduct. Central United's unilateral imposition of the endorsement and change in its claims administration practices for "actual charge" policies is fraudulent, amounts to a failure to carry out its contracts in good faith, and compelled claimants to accept less than the amount due under the terms of their policies, in violation of §§375.445 and 375.936(13). Director's Order, ¶¶ 55-56.

(ii). Central United's altered claims administration procedures for "actual charge" benefits effective in February 2003 highlighted an ambiguity in Central United's policy

forms. When there is an ambiguity in an insurance contract, the contract must be construed in favor of the policyholder. *Jones v. Mid-Century Ins. Co.*, 287 S.W.3d 687, 690 (Mo. banc 2009).

Section 376.777.7(3), RSMo, prohibits ambiguities in individual health insurance policies. For the policy forms to comply with §§376.777.7(3) and 376.780.2, RSMo, Central United was under an obligation to interpret the ambiguous, undefined term “actual charges” in the manner most favorable to the insured. By adopting and implementing the less favorable interpretation and claims administration procedures for those policies where “actual charges” was undefined, Central United violated §376.780 by delivering policies not in conformance with §376.777.7(3).

Central United’s witnesses Lee Ann Blakey, Mark Chapman, and Dr. Michael Morrissey testified that the changes in medical billing, dating back to at least the 1980s, necessitated the changes in the administration of actual charges benefits. Central United assumed the block business of Dixie National Life Insurance Company in 1996 and of Commonwealth National Life Insurance Company in 1997. Thus, the testimony of these three witnesses cannot justify or excuse Central United’s changed administration of actual charges benefits in 2003. Central United’s failure, when purchasing these blocks of business, to recognize the change in medical billing and reimbursement cannot be shifted to the shoulders of its policyholders. Director’s Order, ¶¶ 57, 58, 63 and 64.

(iii). Because Central United changed how it administered claims so that the amount paid on a claim depended on the amount the provider accepted as payment in full from the policyholder’s “other insurance,” rather than the billed amount, the policyholder’s benefit under the Central United policy was adversely affected by any “other insurance” the policyholder may have had. As a result of the change in the manner in which Central United administered its claims, any benefit payments that were based on a provider’s “actual charge”

were limited to whatever lower amount the provider agreed to accept from the policyholder's primary health plan, Medicare, or other third party payer.

Central United's failure to disclose that the policyholder's actual charges benefits were affected by "other insurance" made Central United's marketing and advertising of its policy forms incomplete, deceptive, ambiguous and a misrepresentation of the benefits, advantages, conditions, or terms of the policies as interpreted by Central United, in violation of §375.934(2), as defined by § 375.936(6) and 20 CSR 400-5.700(4) and (5)(A)1. Where the advertisements claimed that the benefits would be "in addition to" or "regardless" of other insurance, it is reasonable for an consumer to believe that they would be required to pay what a doctor bills, or what a patient would actually be charged in the absence of other insurance. Director's Order, ¶¶59, 60.

(iv). Central United's marketing and advertising of ambiguously worded policy forms through uninformed insurance agents between February 1, 2003, and July 1, 2003, occurred with such frequency so as to indicate a general business practice to engage in that type of conduct, constitutes a violation of § 375.934(2) by engaging in unfair trade practices as defined in § 375.936(6). Missouri law prohibits any insurance company transacting business in Missouri from conducting its business fraudulently, carrying out its contracts in bad faith, or compelling insured to accept less than the amount due under the terms of their policy. §375.445. Central United engaged in such conduct, which constitutes a violation of § 374.445 and is an unfair trade practice pursuant to § 375.934, with such frequency to indicate a general business practice to engage in such conduct. § 376.936(13), RSMo. Director's Order, ¶¶ 61 and 62.

g. A strong presumption exists in favor of the validity of an administrative determination. *Gamble v. Hoffman*, 732 S.W.2d 890, 894 (Mo. banc 1987). The courts "'will not assume that [an] administrative body was improperly influenced absent clear and convincing evidence' to the contrary. *Id.* (citation omitted). The Court finds and concludes, based upon the

whole record, that the hearing officer properly exercised her discretion and provided Central United a full, fair and impartial hearing and the Director provided a full, fair and impartial determination of Central United's claims. There were no improper delays prior to the commencement of the administrative proceeding, and those delays that did occur did so with Central United's participation. That Central United received only a portion of its requested continuances does not evidence an absence of impartiality. The record of the hearing does not demonstrate that the hearing officer favored either the Division or the Director in this matter.

h. The Court finds and concludes that the Director was not estopped by the conduct of two Consumer Affairs Division employees from finding that Central United's changed administration of "actual charge" benefits violated Missouri law because Central United failed to demonstrate the required elements for estoppel against the government. To successfully assert estoppel against the government, "the party must ... show that the governmental conduct on which the claim is based constitutes affirmative misconduct." *JGJ Properties, LLC v. City of Ellisville*, 303 S.W.3d 642, 651 (Mo. App. E.D. 2010). Equitable estoppel only runs against the state "where there are exceptional circumstances and a manifest injustice will result." *Gosal v. City of Sedalia*, 291 S.W.3d 822, 828 (Mo. App. W.D. 2009). Central United has not demonstrated that the Director is equitably estopped from enforcing Missouri law. This is particularly true in light of the fact that Central United changed its actual charge claims procedure nine months before it received the first letter on which its estoppel claim is based.

i. The Court finds and concludes the following based upon the whole record and as a matter of law:<sup>1</sup>

i. That Central United failed to complete its investigation of 29 claims within 30 days after notification of the claim, although the investigations could

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<sup>1</sup> Nowhere in its Petition for Judicial Review of Administrative Decision, filed on September 24, 2009, nor in its Brief, filed February 16, 2010, did Central United challenge as erroneous the facts set forth in paragraphs 33 through 38 of the Director's Findings of Fact, nor the conclusions set forth in paragraphs 43-53 and 65-69 of the Director's Conclusions of Law.

reasonably have been completed within this time, in violation of § 375.1007(3) and 20 CSR 100-1.050(4);

ii. That Central United failed to advise claimants of the acceptance or denial of 57 claims within 15 working days of receipt of all forms necessary to establish the nature and extent of the claims, in violation of § 375.1007(3) and 20 CSR 100-1.050(1)(A);

iii. That Central United improperly reduced a policyholder's benefits, in violation of 20 CSR 100-1.020(1);

iv. That Central United failed to include one complaint in its Company Complaint Log, in violation of § 375.936(3) and 20 CSR 100-8.040(6); and

v. That Central United failed to respond to three criticisms and one formal request within 10 calendar days after receipt, in violation of § 374.205.2(2) and 20 CSR 100-8.040(6).

j. Because Central United does not appeal the Conclusions of Law set forth in ¶¶ 43 through 53 of the Director's Order, and because they are not erroneous as a matter of law, the Court finds and concludes that such Conclusions of Law are affirmed.

k. The Court finds and concludes, based upon the whole record, that the Director's Order is:

- i. not in violation of constitutional provisions;
- ii. not in excess of his statutory authority or jurisdiction;
- iii. supported by competent and substantial evidence upon the whole record;
- iv. authorized by law;
- v. made upon lawful procedure and a fair trial;
- vi. not arbitrary, capricious or unreasonable; and
- vii. does not involve an abuse of discretion.

**JUDGMENT**

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED THAT the Director's Order  
is affirmed.

So Ordered, adjudged and decreed, this \_\_\_\_ day of \_\_\_\_\_, 2010.

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The Honorable Patricia S. Joyce,  
Circuit Judge